No. 14-185

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' decision denying a request for equitable tolling of the 90-day statutory period for filing a motion to reopen removal proceedings as a result of ineffective assistance of counsel.

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BRIEF FOR PETITIONER

INTRODUCTION

Congress has provided the federal courts of appeals with jurisdiction to review final orders of removal, including the denial of motions to reopen removal proceedings under 8 U.S.C. § 1229a(c)(7). Yet the Fifth Circuit has declined to exercise its appellate jurisdiction with regard to a particular subcategory of motions to reopen, namely those accompanied by a request for equitable tolling of the 90-day filing period for such a motion. 8 U.S.C. § 1229a(c)(7)(C)(i). No other circuit shares that approach, which cannot be reconciled with the governing statute, with this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), with the well-established presumption in favor of judicial review of

administrative decisions, or with the law of equitable tolling generally. The Court should reverse the Fifth Circuit's judgment and remand for consideration of the merits of Mr. Mata's petition for review.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The order of the court of appeals denying rehearing and rehearing en banc (*id.* 24-25) is unreported. The decision of the Board of Immigration Appeals (BIA) summarily dismissing Petitioner's appeal (JA4-5) is unreported. The decisions of the BIA denying Petitioner's motion to reopen (Pet. App. 6-9) and motion for reconsideration (*id.* 4-5) are unreported. The decision and order of the immigration judge (JA6-13; Pet. App. 21-23) are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals entered judgment on March 5, 2014 (Pet. App. 1), and denied a timely petition for rehearing on May 16, 2014 (*id.* 24-25). The petition for certiorari was filed on August 14, 2014, and granted on January 16, 2015.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in the appendix to this brief.

STATEMENT

A. Background Regarding Motions To Reopen Removal Proceedings

In 1996, Congress amended the Immigration and Nationality Act (INA) to provide that a noncitizen who is ordered removed is entitled to file one motion asking the immigration judge or BIA to reopen the removal proceedings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-593 (IIRIRA) (codifed as amended at 8 U.S.C. § 1229a(c)(7)); *see also Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008) (IIRIRA "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien").

The statutory motion to reopen "is a form of procedural relief that 'asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.'" *Dada*, 554 U.S. at 12; *see also Kucana* v. *Holder*, 558 U.S. 233, 248 (2010) ("The motion to reopen is a procedural device serving to ensure 'that aliens are getting a fair chance to have their claims heard.'" (alterations omitted)). As this Court has recognized, statutory motions to reopen stand as an "important safeguard" in the removal process, *Dada*, 554 U.S. at 18, and were "intended 'to ensure a proper and lawful disposition' of immigration proceedings," *Kucana*, 558 U.S. at 242 (quoting *Dada*, 554 U.S. at 18).

A motion to reopen must ordinarily be filed within 90 days of the date of entry of a final administrative removal order. 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2); *see also* 8 U.S.C. § 1101(a)(47)(B) (providing that a removal order becomes final upon affirmance

by the BIA or expiration of the period for seeking BIA review). As explained by the BIA and the United States in this case, as well as every court of appeals to have decided the question, the statutory filing period governing motions to reopen is subject to equitable tolling. Pet. App. 7 (BIA decision) ("the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel"); U.S. Cert. Br. 13; *see also, e.g.*, *Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013). The BIA's decision in *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (1988), sets forth the BIA's requirements for a claim of ineffective assistance of counsel: (1) an affidavit from the noncitizen attesting to the relevant facts and detailing his or her agreement with former counsel and what former counsel did and did not represent to the client; (2) an indication that former counsel was informed of the allegations and allowed an opportunity to respond; and (3) a statement whether a complaint was filed with the appropriate disciplinary authorities or, if no complaint was filed, an explanation why not. The movant must also show that he or she was prejudiced by former counsel's conduct. *Id.* at 638. And when a motion to reopen is joined with a request for equitable tolling due to ineffective assistance of counsel, the movant must show diligent pursuit of his or her rights. *E.g.*, *Matter of Moreta-Verdezoto*, 2008 WL 4066031, at *1 (BIA Aug. 4, 2008) (per curiam) ("The motion will be granted because the respondent meets the requirements to allege ineffective assistance of counsel, shows prejudice, and shows due diligence so that equitable tolling of the time limitation on motions to reopen is warranted.").[1]

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[1] This Court has stated that a movant seeking equitable tolling must show "that some extraordinary circumstance stood in his

B. Proceedings Before The Immigration Judge

Petitioner Noel Reyes Mata, a citizen of Mexico, has lived in the United States for almost 15 years. Administrative Record (AR) 214-215. He is the father of three native-born U.S. citizen children, ages 10, 9, and 6. AR514-516. Mr. Mata currently works as a welder (AR216) and supports his three children (AR119).

On September 15, 2010, the government initiated removal proceedings against Mr. Mata by filing a Notice to Appear. AR562. Mr. Mata retained an attorney to represent him in the removal proceedings. AR118.

1. Mr. Mata's proceedings before the immigration judge consisted of two hearing days. On January 24, 2011, counsel conceded Mr. Mata's removability, but informed the court that Mr. Mata would be seeking cancellation of removal. Pet. App. 11; *see* 8 U.S.C. § 1229b(b)(1) (allowing an immigration judge to "cancel") the removal of a nonpermanent resident and adjust the person's status to that of a lawful permanent resident). To be eligible for this relief, the noncitizen must establish: (1) continuous presence in the United States for 10 years or more; (2) good moral character during that time; (3) no conviction of certain criminal offenses, including "crime[s] involving moral turpitude";[2] and (4) that his removal would result in excep-

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way," *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005), and that "professional misconduct" of counsel may "amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling," *Holland* v. *Florida*, 560 U.S. 631, 651 (2010).

[2] 8 U.S.C. § 1229b(b)(1)(C) cross-references 8 U.S.C. § 1182(a)(2), which describes "[c]riminal and related" grounds of inadmissibility, including conviction for "a crime involving moral

tional or extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b)(1).

Mr. Mata claimed eligibility based on satisfaction of all four factors. The government asserted that Mr. Mata was ineligible for relief because he had pled guilty under Texas Penal Code § 22.01(a)(1) to misdemeanor assault on "a person with whom [Mr. Mata] had a dating relationship" (Pet. App. 12-15)—a conviction for which Mr. Mata received a sentence of 30 days' imprisonment (AR526).

The immigration judge asked Mr. Mata's counsel whether the misdemeanor conviction was a disqualifying crime involving moral turpitude. AR197. Counsel responded that it was not and that he would file a brief addressing this issue. AR197-198.

Despite his promise to the court and his client, counsel never filed a brief explaining why Mr. Mata's conviction was not for a crime involving moral turpitude, nor did he develop the argument orally during the two days of hearings.

2. The second day of Mr. Mata's immigration hearing occurred eight months later on August 24, 2011. AR203. Prior to this hearing date, counsel filed Mr. Mata's required application for cancellation of removal, which included a proposed witness list of individuals whom Mr. Mata planned to call to testify at the hearing, including his brother-in-law, Enrique de Jesus Rodriguez; his sister-in-law, Luz Maria White; and his work supervisor, Cruz Ramon Arreola. AR518-519. These witnesses would testify about, among other

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turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. § 1182(a)(2)(A)(i)(I).

things, Mr. Mata's continuous residence in the United States for 10 years and "the effect of separation if [Mr. Mata] were ordered removed." AR518. Mr. Mata himself expected to testify as well.

Although the immigration judge began the hearing by placing Mr. Mata under oath (JA15), neither he nor any other witness was allowed to testify. Instead, the judge had a brief colloquy with counsel, during which the judge confirmed that Mr. Mata did not dispute that the criminal record submitted by the government was in fact Mr. Mata's. JA16. The judge then decided to "pretermit" Mr. Mata's request for relief and order him removed, explaining:

> So what I'm going to do today, [counsel], is pretermit his application. I'm not going to listen to any further testimony regarding the other elements of his eligibility for cancellation of removal. What I'm going to do, [is] deny the application.

JA18. The decision to pretermit was made after the court accepted Mr. Mata's application for cancellation of removal and supporting documentation, but before Mr. Mata had introduced any additional evidence—oral or documentary—in support of his claim. JA15-18.

In her decision denying Mr. Mata's application for cancellation of removal, the immigration judge concluded that Mr. Mata was not eligible for cancellation because, in the judge's view, his conviction was for a crime involving moral turpitude. JA11-13. In assessing that issue, the judge (JA9) relied on *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), which established a three-part framework for determining whether a criminal offense was a crime involving moral turpitude, requiring judges to: (1) conduct a categorical

analysis of the relevant statute; (2) if necessary, use a modified categorical approach and examine the person's record of conviction; and (3) "[w]hen the record of conviction is inconclusive," and "to the extent they deem it necessary and appropriate," to consider evidence outside the formal record of conviction. *Id.* at 689-690. The Fifth Circuit later vacated the *Silva-Trevino* decision, holding that the third step of the framework was "inconsistent with the unambiguous language of the relevant statutory provision." *Silva-Trevino* v. *Holder*, 742 F.3d 197, 198 (5th Cir. 2014).[3] The immigration judge did not assess Mr. Mata's claim under the other three elements of Section 1229b(b)(1), as to which no evidence had been permitted during the hearing.

C. Proceedings Before The BIA

1. On September 2, 2011, counsel noticed Mr. Mata's appeal to the BIA. AR173-176. On the second page of the notice, counsel checked a box indicating that he would subsequently file a written brief or statement. AR174. Counsel subsequently received two notices from the BIA including written warnings that Mr. Mata's case could be summarily dismissed if he failed to file a brief. AR160; AR168; *see also* 8 C.F.R.

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[3] Other circuits have likewise rejected the *Silva-Trevino* framework. *See Olivas-Motta* v. *Holder*, 746 F.3d 907, 908 (9th Cir. 2013); *Prudencio* v. *Holder*, 669 F.3d 472, 476 (4th Cir. 2012); *Fajardo* v. *U.S. Att'y Gen.*, 659 F.3d 1303, 1311 (11th Cir. 2011); *Jean-Louis* v. *U.S. Att'y Gen.*, 582 F.3d 462, 470 (3d Cir. 2009). Moreover, the framework has been further undermined by this Court's decisions in *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013) (noting that, in using the categorical approach, "we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized") and *Descamps* v. *United States*, 133 S. Ct. 2276, 2283, 2286 (2013) (noting that the modified categorical approach "serves a limited function").

§ 1003.1(d)(2)(i)(E) (the BIA may summarily dismiss an appeal when "[t]he party concerned indicates ... that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so"). Despite these warnings, counsel never filed a brief for Mr. Mata in the BIA. AR139; JA4-5.

On September 21, 2012, the BIA summarily dismissed Mr. Mata's appeal. JA4-5. The decision explained that counsel's notice of appeal did not "contain statements that meaningfully apprise the Board of specific reasons underlying the challenge to the Immigration Judge's decision" and that no brief had ever been filed. *Id.*

2. The BIA sent Mr. Mata its decision by mail.[4] AR138. Mr. Mata then began to assess his legal options and sought out new counsel. AR118-119. By October 15, 2012, roughly three weeks after the date of the BIA's notice denying his appeal, Mr. Mata had consulted with two attorneys who informed him that his former attorney "neglected [his] case by failing to file an appeal brief." AR118, 134. By October 17, 2012, Mr. Mata had filed a complaint against his former attorney with the State Bar of Texas. AR129-134. The Texas Office of Chief Disciplinary Counsel later investigated Mr. Mata's former counsel and found that there was just cause to believe that he had committed an act of professional misconduct under the Texas Rules of Disciplinary Procedure by failing to file a brief in Mr. Mata's case. AR57-58.

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[4] The English-language decision was sent to Mr. Mata's home. Mr. Mata does not read English and only communicated with the immigration court through a Spanish interpreter. JA15.

3. On January 14, 2013, 115 days after the BIA issued its decision summarily denying his appeal and 25 days after the 90-day period had elapsed, Mr. Mata—represented by new counsel—moved in the BIA to reopen his removal proceedings. Pet. App. 6. The motion sought reopening under the standards set forth by the BIA in *Lozada*, 19 I. & N. Dec. at 639, because his prior counsel had been ineffective. Pet. App. 7. Mr. Mata submitted the documentation required by *Lozada*, including an affidavit stating that he had hired his former attorney but that counsel had never filed a brief in support of Mr. Mata's appeal, AR118-120; a letter to former counsel alleging ineffective assistance in Mr. Mata's case, AR122-123; former counsel's response to that letter, AR125-127; and documentation showing that Mr. Mata had filed a grievance with the State Bar of Texas, AR129-135. Mr. Mata further asserted that, by virtue of ineffective representation, he "was not able to challenge the Government allegations and appeal his case to the BIA." AR91.

The BIA denied Mr. Mata's motion to reopen on March 22, 2013, finding that it was untimely because it was filed 25 days outside the 90-day statutory period. Pet. App. 6-9; *see* 8 U.S.C. § 1229a(c)(7)(C)(i). As an initial matter, the Board acknowledged that the 90-day filing period "may be tolled in cases of ineffectiveness of counsel." Pet. App. 7. Nevertheless, the Board declined to apply equitable tolling because it believed Mr. Mata failed to show that he was prejudiced by former counsel's failure to submit a brief. *Id.* 7-8.

Mr. Mata moved to reconsider the BIA's denial of the motion to reopen. Pet. App. 4. Mr. Mata noted that he had been prejudiced by former counsel's ineffective assistance, which deprived him of the opportunity to

have the BIA consider the merits of his appeal. AR13. The BIA denied reconsideration. Pet. App. 4-5.

D. Court Of Appeals Proceedings

Pursuant to 8 U.S.C. § 1252, Mr. Mata petitioned the United States Court of Appeals for the Fifth Circuit for review of the BIA's decisions. Pet. App. 2. As relevant here, Mr. Mata argued that the BIA should have applied equitable tolling based on his ineffective-assistance-of-counsel claim. Pet. C.A. Br. 7. In response, the government noted that, under circuit precedent, a BIA decision denying equitable tolling of the period to file a motion to reopen due to ineffective assistance of counsel was "beyond the court's jurisdiction." Resp. C.A. Br. 18 (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)). In reply, Mr. Mata argued that *Ramos-Bonilla*, which addressed jurisdiction to review pre-IIRIRA regulatory reopening of deportation proceedings, had been undermined by this Court's jurisdictional ruling in *Kucana* v. *Holder*, 558 U.S. 233 (2010), which addressed post-IIRIRA statutory reopening of removal proceedings. Pet. C.A. Reply Br. 9. Mr. Mata also pointed out (*id.* 4-6) that this Court's recent guidance in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), reinforced his substantive position that the immigration judge erred in treating his conviction as a crime involving moral turpitude.

The Fifth Circuit dismissed Mr. Mata's appeal for lack of jurisdiction. Pet. App. 1-3. Citing *Ramos-Bonilla*, the court stated that it construes requests for equitable tolling based on ineffective assistance of counsel as requests that the BIA exercise its regulatory authority to reopen proceedings *sua sponte* under 8

C.F.R. § 1003.2(a).[5] *Id.* 2-3. The court reasoned that it lacked a "meaningful standard [of review] against which to judge" the BIA's denial of Mr. Mata's request for equitable tolling. *Id.* The court also ruled that *Kucana* did not compel a different outcome. *Id.* 3. Mr. Mata petitioned for rehearing en banc, pointing out that the Fifth Circuit's jurisdictional ruling diverges from that of every other circuit to have considered the issue. Pet. for Reh'g iv-v. The Fifth Circuit denied rehearing. Pet. App. 24-25.

In response to Mr. Mata's petition for certiorari, the government acknowledged that it "agrees with petitioner that the court of appeals erred in denying his petition for review for lack of jurisdiction under *Ramos-Bonilla* v. *Mukasey*." U.S. Cert. Br. 11. It further noted that "[t]here are adequate standards to be applied by a court of appeals in reviewing Board decisions rejecting arguments for equitable tolling based on ineffective assistance of counsel." *Id.* 12.

This Court granted certiorari and appointed an amicus curiae to defend the Fifth Circuit's judgment.

SUMMARY OF ARGUMENT

A. Congress defines the jurisdiction of the federal courts of appeals, and it has clearly authorized them to hear petitions for review of final orders of removal, including denials of motions to reopen removal proceedings. 8 U.S.C. § 1252(a)(1), (b)(6). Recently, this Court

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[5] The BIA has held that it may reopen a case *sua sponte* in "exceptional situations" (*Matter of Beckford*, 22 I. & N. Dec. 1216, 1218 (BIA 2000)), including in "unique situations where it would serve the interest of justice" (*Matter of X-G-W-*, 22 I. & N. Dec. 71, 73 (BIA 1998), *superseded on other grounds by Matter of G-C-L-*, 23 I. & N. Dec. 359 (BIA 2002)).

recognized that, following IIRIRA's codification of the motion to reopen as a statutory remedy, "[a]ction on motions to reopen ... remain[s] subject to judicial review." *Kucana* v. *Holder*, 558 U.S. 233, 253 (2010). That ruling applied the established presumption favoring judicial review of administrative decisions, which applies equally to the BIA's decision on Mr. Mata's motion to reopen.

There is no reason to accord different treatment to the subcategory of denials of motions to reopen at issue here, namely those that rest on a refusal to apply equitable tolling to the 90-day limitation period of 8 U.S.C. § 1229a(c)(7)(C)(i). Equitable tolling is presumptively implied in such statutory time periods, and the 90-day period is a nonjurisdictional "claim processing" rule that is indistinguishable from other provisions this Court has ruled are subject to equitable tolling. Indeed, no court of appeals has held that the 90-day period cannot be equitably tolled, and the Fifth Circuit is the only one to have concluded that its jurisdiction to review decisions denying motions to reopen somehow excludes review of equitable tolling determinations.

B. The Fifth Circuit's reasons for its lone position do not withstand scrutiny. The court "construes" requests for equitable tolling, including those on the basis of ineffective assistance of counsel, as requests for the BIA to reopen the removal proceeding *sua sponte*. That is error. A *statutory* motion filed under 8 U.S.C. § 1229a(c)(7) does not invoke the BIA's *regulatory* authority to reopen the case *sua sponte*. And when a statutorily authorized motion invokes the equitable tolling doctrine, it simply asks that the failure to comply with the 90-day period of 8 U.S.C. § 1229a(c)(7)(C) be excused for equitable reasons, such that a facially late motion is treated as timely under the statute.

The Fifth Circuit is also incorrect in suggesting that there is no meaningful standard that it can apply in reviewing a decision denying equitable tolling. The application of equitable tolling is the subject of settled standards, and the BIA's own *Lozada* decision provides standards for ineffective assistance of counsel—all of which are frequently applied by reviewing courts, including the Fifth Circuit. This also demonstrates that, even if Mr. Mata's motion were considered a request for *sua sponte* reopening (which it is not), the court of appeals would still have authority to review it because the agency has established a settled course of adjudication with respect to ineffective assistance of counsel claims, thus permitting ample basis for review.

The Fifth Circuit's judge-made exception to its own appellate jurisdiction is unsupported and should be reversed.

ARGUMENT

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE BIA'S EQUITABLE TOLLING DETERMINATION

A. Congress Conferred Jurisdiction On The Courts Of Appeals To Review BIA Decisions Refusing To Reopen Removal Orders, Including Refusals Of Equitable Tolling Of The 90-Day Filing Period

1. The jurisdiction of the federal courts of appeals is defined by statute. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Congress has unambiguously provided that the courts of appeals have jurisdiction over petitions for review of orders of removal. 8 U.S.C. § 1252(a)(1) ("Judicial review of a final order of removal ... is governed only by chapter 158 of title 28[.]"); 28 U.S.C. § 2342 (part of "chapter 158 of ti-

tle 28," granting "[t]he court of appeals ... exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final agency actions); *see also* 8 U.S.C. § 1252(b) ("Requirements for review of orders of removal").

Congress also specifically granted jurisdiction to the courts of appeals to review BIA decisions on motions to reopen and to reconsider final orders of removal. 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, *any review sought of a motion to reopen or reconsider* the order shall be consolidated with the review of the order." (emphasis added)). Section 1252(b)(6) does not distinguish between particular grounds for denying a motion to reopen, demonstrating that Congress conferred jurisdiction on the courts of appeals to review decisions on motions to reopen generally, irrespective of the basis for the decision.

Furthermore, this Court held in 2010 that "[a]ction on motions to reopen ... remain[s] subject to judicial review," notwithstanding IIRIRA's significant modification of the INA's jurisdictional provisions. *Kucana* v. *Holder*, 558 U.S. 233, 253 (2010). *Kucana* rested in part on the "strong presumption" that Congress intends judicial review of administrative action and legislates with that presumption in mind. *Id.* at 251 (noting that the Court has "consistently applied" the presumption of judicial review to immigration decisions, "particularly to questions concerning the preservation of federal-court jurisdiction"); *see also INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001); *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993) ("[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action.'"); *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It

is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and ... our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[.]"); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) ("From the beginning, 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967))).

To overcome the presumption of judicial review of agency action, there must be "clear and convincing" evidence that Congress intended to foreclose review. *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (internal quotation marks omitted). But this Court has already held that there is "no ... evidence" that Congress intended to prevent judicial review of motions to reopen. *Kucana*, 558 U.S. at 252.[6]

Because Congress has given the courts of appeals jurisdiction to review BIA decisions denying motions to reopen, the court was required to exercise that jurisdiction and decide Mr. Mata's appeal on the merits. *See, e.g., Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to ex-

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[6] The statutory text favors jurisdiction in an additional way. Congress included a section listing "Matters not subject to judicial review," but did not list denials of motions to reopen in that section. 8 U.S.C. § 1252(a)(2). Since "Congress explicitly enumerate[d] certain exceptions to a general prohibition, additional exceptions are not to be implied." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *see also Jama* v *ICE*, 543 U.S. 335, 341 (2005); *Raleigh & Gaston R.R. Co.* v. *Reid*, 80 U.S. (13 Wall.) 269, 270 (1872).

ercise the jurisdiction given them"); *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction[.]").

2. Against this backdrop, the commonplace and correct application of equitable tolling to the 90-day statutory filing period does nothing to disturb the courts of appeals' appellate jurisdiction. As the courts of appeals themselves have consistently held, and as the BIA noted in this case, the 90-day filing period in 8 U.S.C. § 1229a(c)(7)(C) is nonjurisdictional and subject to equitable tolling. *See* U.S. Cert. Br. 13 ("As the Board correctly noted in this case, 'the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel.'" (quoting Pet. App. 7 (BIA decision))).

Equitable tolling is "a long-established feature of American jurisprudence" that "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). The doctrine "enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.'" *Holland* v. *Florida*, 560 U.S. 631, 650 (2010). The effect of equitable tolling is to "extend[] the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute." *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting). The doctrine thus effectively extends the relevant period to treat an otherwise untimely action as timely. *See Lozano*, 134 S. Ct. at 1231-1232; *American Pipe & Constr. Co.* v. *Utah*, 414 U.S.

538, 560-561 (1974) (determining "the precise effect" that tolling "had on the relevant limitation period" and explaining that since suit was brought "with 11 days yet to run in the period as tolled by [the statute at issue]" and the "motions were filed only eight days after" the clock restarted, "it follows that the motions were timely").

The BIA was thus correct to recognize that Section 1229a(c)(7)(C)(i)'s 90-day filing period can be tolled in cases of ineffectiveness of counsel. Pet. App. 7. The time period is not jurisdictional, as it does not "govern[] a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011). Instead, the 90-day period is "[a]mong the types of rules that should not be described as jurisdictional," but rather as "'claim-processing rules,'" which merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1203; *see also Arbaugh* v. *Y & H Corp*, 546 U.S. 500, 510 (2006) ("[W]e have clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." (internal quotation marks omitted)). Indeed, the text of Section 1229a(c)(7)(C)(i) is essentially indistinguishable from the statutory provision found to be a nonjurisdictional claim-processing rule in *Henderson*. *Compare* 38 U.S.C. § 7266(a) ("shall file a notice of appeal with the Court [of Appeals for Veterans Affairs] within 120 days after the date on which notice of the decision is mailed"), *with* 8 U.S.C. § 1229a(c)(7)(C)(i) ("the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal").

Such nonjurisdictional rules are "subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'"

Holland, 560 U.S. at 645-646. Indeed, Section 1229a(c)(7)(C)(i)'s simple, declarative structure mirrors other provisions that this Court has found subject to equitable tolling. *See id.* at 647 (applying equitable tolling where relevant statute "read[] like an ordinary, run-of-the-mill statute of limitations"); *cf. United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (explaining that "ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception" and noting as an example a provision requiring that employment discrimination suits be filed "'[w]ithin 90 days of receipt of notice of final [EEOC] action'").

Notably, Section 1229a(c)(7)(C)(i) was enacted in 1996,[7] after this Court's decision in *Irwin* v. *Department of Veterans' Affairs*, 498 U.S. 89 (1990), such that Congress "was likely aware that courts, when interpreting [the] timing provision[], would apply the presumption" of equitable tolling. *Holland*, 560 U.S. at 646; *see also Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34, (1995) ("'[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents ... and that it expect[s] its enactment[s] to be interpreted in conformity with them.'" (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979))). And equitable tolling is particularly warranted in the context of removal proceedings under the INA, which are often navigated by "'laymen, unassisted

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[7] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-593.

by trained lawyers.'" *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982); *see* DOJ Executive Office for Immigration Review, *Statistical Yearbook 2000*, at J1 (2001) (in 1996, as Congress was considering Section 1229a(c)(7)(C)(i), a mere 37% of noncitizens whose removal proceedings were adjudicated by an immigration judge had legal representation).[8]

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[8] *Sebelius* v. *Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), is not to the contrary. The Medicare time limitation at issue there, 42 U.S.C. § 1395oo(a)(3), was enacted in 1972, long before this Court's 1990 decision in *Irwin*, thus weakening the presumption in favor of equitable tolling in that case. *See Auburn Reg'l*, 133 S. Ct. at 827 (noting that the Act before 1972 did not provide for administrative or judicial review, and that the 180-deadline was enacted "with no statutory exceptions"); *see also Holland*, 560 U.S. at 646 (noting that "[t]he presumption's strength is yet further reinforced" where the relevant statute is enacted after *Irwin*). Additionally, in *Auburn Reg'l*, the agency had promulgated a regulation allowing for the statutory 180-day filing period to be extended up to three years "for good cause shown." 133 S. Ct. at 826. By allowing "only a distinctly limited extension of time to appeal," the agency had brought its specialized "experience" to bear on the issue and ultimately determined that the deadline should have "three years as the outer limit." *Id.* at 826. The Court was careful to note that the agency's decision to create an outer bound for the filing deadline was owed deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and that the Court was ultimately compelled to uphold the agency's decision as a "permissible construction" of the statute, "even if it differ[ed] from how the court would have interpreted the statute in the absence of an agency regulation." *Auburn Reg'l*, 133 S. Ct. at 826-827 (citing *National Cable & Telecommc'ns Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). Here, by contrast, no equivalent regulation exists, and the BIA itself has recognized the availability of equitable tolling of the 90-day filing period. Pet. App. 7. Finally, the appeals deadline in *Auburn Reg'l* applied only to Medicare providers, "'sophisticated' institutional providers assisted by legal counsel, and 'generally capable of identifying an underpayment ... within the 180-day time period specified in [the

3. The foregoing principles dictate the outcome in this case. Indeed, every circuit to have squarely addressed the issues has recognized both the availability of equitable tolling of the 90-day filing period for motions to reopen *and* exercised jurisdiction to review the BIA's equitable tolling determinations. Sometimes that jurisdiction is exercised to affirm the BIA's denial of equitable tolling on the merits. *E.g.*, *Iavorski* v. *INS*, 232 F.3d 124, 132-135 (2d Cir. 2000) (Sotomayor, J.); *see also Avila-Santoyo* v. *U.S. Att'y Gen.*, 579 F. App'x 860, 861-863 (11th Cir. 2014) (per curiam) (recognizing earlier holding in the same case that the 90-day period is subject to equitable tolling, 713 F.3d 1357 (11th Cir. 2013), and affirming BIA's equitable tolling decision on the merits); *Kuusk* v. *Holder*, 732 F.3d 302, 305-307 (4th Cir. 2013) (holding that motions to reopen are subject to equitable tolling and affirming the BIA's tolling determination on the merits); *Alzaarir* v. *Attorney Gen.*, 639 F.3d 86, 90-91 (3d Cir. 2011) (per curiam); *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833, 838-839 (10th Cir. 2005). In appropriate cases, courts grant the petition for review and reverse the BIA's denial of equitable tolling. *E.g.*, *Avagyan* v. *Holder*, 646 F.3d 672, 678-682 (9th Cir. 2011); *Mezo* v. *Holder*, 615 F.3d 616, 620-622 (6th Cir. 2010); *Gaberov* v. *Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008). Even the Fifth Circuit issued such a decision not long ago. *See Torabi* v. *Gonzales*, 165 F. App'x 326, 329, 330 (5th Cir. 2006) ("[W]e have jurisdiction to review the denial of Torabi's motion to reopen" and "hold the BIA abused its discretion by its untimeliness basis for denial."). Importantly, no circuit holds that the 90-day period is not subject to equitable

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statute]." 133 S. Ct. at 828. As explained in text, removal proceedings, which many unsophisticated parties must navigate without legal representation, are decidedly different.

tolling, and no circuit besides the Fifth holds that it lacks jurisdiction to review the BIA's equitable tolling determinations.[9]

Accordingly, the plain language of the INA's judicial review provisions, this Court's decision in *Kucana*, the presumption of review of agency action, and the availability and judicial reviewability of equitable tolling all point toward federal appellate jurisdiction in Mr. Mata's case.

B. The Fifth Circuit's Contrary Reasoning Is Erroneous

The Fifth Circuit nonetheless ruled that, where the BIA's denial of a motion to reopen is based on a refusal to equitably toll the statutory 90-day filing period, it lacks appellate jurisdiction to review the BIA's decision. Pet. App. 2-3. The Fifth Circuit's reasons for creating its own jurisdictional exception do not withstand scrutiny.

1. The Fifth Circuit's primary basis for refusing to hear Mr. Mata's appeal is that "[i]n this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is *construed as* an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*." Pet. App. 2 (emphasis added). The court based this view on *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), which in

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[9] The First Circuit has ruled that it has jurisdiction to review BIA decisions denying equitable tolling of the statutory 90-day period, though it has so far not needed to decide whether equitable tolling in fact applies. *Neves* v. *Holder*, 613 F.3d 30, 33 (1st Cir. 2010) (per curiam) ("We hold that we have jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing [petitioner's] second motion to reopen[.]").

turn relied on three non-precedential decisions for the proposition that "equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte.'" *Id.* at 220 (citing *Ben Jie Lin* v. *Mukasey*, 286 F. App'x 148, 150 (5th Cir. 2008) (per curiam); *Yang* v. *Mukasey*, 278 F. App'x 442, 443 (5th Cir. 2008) (per curiam); *Riera-Elena* v. *Mukasey*, 277 F. App'x 400, 402 (5th Cir. 2008) (per curiam)).

The Fifth Circuit's cases hold that an equitable tolling request must be treated as a request for *sua sponte* reopening on the theory that "equitable tolling is not a basis for filing an untimely or numerically-barred motion under the statute." *Ben Jie Lin*, 286 F. App'x at 150. That statement is simply incorrect. While such a motion is "untimely" in that it does not facially comply with the statute's claim-processing deadline, the effect of equitable tolling is to pause the running of the clock during the period when it would be inequitable to penalize the noncitizen for failing to file a motion. *See Lozano*, 134 S. Ct. at 1232 ("[equitable tolling] effectively extends an otherwise discrete limitations period"); *see also McQuiggin*, 133 S. Ct. at 1941 (Scalia, J., dissenting) (equitable tolling "extend[s] the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute"); *United States* v. *Ibarra*, 502 U.S. 1, 4 n.2 (1991) (noting that equitable tolling serves to suspend a time bar that "begins to run again upon a later event"). Assuming the noncitizen acts diligently, the equitable tolling doctrine treats as timely a motion that would otherwise be untimely. Thus, contrary to the Fifth Circuit's statement in *Ben Jie Lin*, equitable

tolling *is* a basis for filing an otherwise untimely motion under the statute.

Consistently with these principles, courts of appeals have indicated that equitable tolling bears on a noncitizen's *statutory* right to seek reopening under 8 U.S.C. § 1229a(c)(7)(C)(i) and does not implicate the BIA's *regulatory* power to reopen a proceeding *sua sponte*. *E.g.*, *Kuusk*, 732 F.3d at 304-305 & n.* (reviewing request for equitable tolling of the 90-day period even though petitioner did not appeal the BIA's refusal to reopen the case *sua sponte*); *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc) ("Because we hold that the BIA should have equitably tolled the ninety-day filing period, we do not reach the question whether the BIA should have exercised its *sua sponte* power to reopen.").[10]

Accordingly, the Fifth Circuit was wrong to consider Mr. Mata's motion as a request for reopening under the BIA's regulatory *sua sponte* authority. Rather, it was a request for the BIA to treat his motion as time-

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[10] The Fifth Circuit's reliance on its *Ramos-Bonilla* decision also failed to account for that decision's different context. The motion to reopen in *Ramos-Bonilla* was not a post-IIRIRA statutory motion under 8 U.S.C. §1229a(c)(7)(C), but instead a motion to reopen a 1987 deportation proceeding subject to the pre-IIRIRA regulation. *See* 543 F.3d at 218 (citing 8 C.F.R. § 1003.2(c)(2)); *see also* IIRIRA § 309, 110 Stat. at 3009-625 (IIRIRA does not apply to a noncitizen who was in deportation proceedings before September 30, 1996); *Ramos-Bonilla*, 543 F.3d at 219 (Ramos-Bonilla was attempting to reopen a deportation order dated May 6, 1987). Because IIRIRA "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief,'" *Kucana*, 558 U.S. at 249, the Fifth Circuit should not have applied the holding of *Ramos-Bonilla* to this case without at least examining whether Congress's codification of that remedy includes equitable tolling of the 90-day period. As shown in Part A above, it does.

ly filed under the statute itself, through operation of the equitable tolling doctrine.

2. The Fifth Circuit has also suggested (Pet. App. 2-3), citing *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985), that there is no jurisdiction to review a denial of equitable tolling because there is no "'meaningful standard'" by which to judge the agency's decision. *Ramos-Bonilla*, 543 F.3d at 220. That is also incorrect. "[G]iven the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments." *Holland*, 560 U.S. at 651. Indeed, this Court has announced a standard for equitable tolling that courts can readily apply. *See Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005) (a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way"); *see also Holland*, 560 U.S. at 651 (noting that "professional misconduct" can "create an extraordinary circumstance that warrants equitable tolling").

Indeed, when a noncitizen seeks to show that the "extraordinary circumstance" that stood in the way of his filing a motion to reopen within the 90-day period was his counsel's ineffective assistance, the BIA itself has crafted "meaningful standard[s]" that it and reviewing courts have also frequently applied. *See Matter of Lozada*, 19 I. & N. Dec. 637, 639-640 (BIA 1988); *see supra* pp. 21 (citing cases). Even the Fifth Circuit has shown itself capable of applying both the equitable tolling standard and the *Lozada* ineffective-assistance-of-counsel standard. *E.g.*, *Ben Jie Lin*, 286 F. App'x at 150 ("Lin has not shown that he is entitled to equitable tolling because he has failed to establish ineffective assistance of counsel under *Matter of Lozada* ... and has not shown that he acted with due diligence in present-

ing his ineffective assistance of counsel claim." (citation omitted)); *see also Shan Fu Cui* v. *Holder*, 347 F. App'x 101 (5th Cir. 2009) (affirming the BIA's denial of a motion to reopen where petitioner failed to comply with the *Lozada* requirements); *Torabi*, 165 F. App'x at 331 (applying equitable tolling doctrine and remanding to the BIA to decide the motion to reopen on the merits).[11]

3. Moreover, even if the Fifth Circuit were correct that Mr. Mata's request for equitable tolling due to ineffective assistance of counsel should be treated as a request for *sua sponte* reopening (though it should not be), the BIA's decision would still be reviewable. As discussed, the standard for equitable tolling is settled and easily applied. And the BIA's *Lozada* decision, dating from 1988, creates a longstanding agency practice regarding ineffective assistance claims that can establish a basis of review. *Franklin* v. *Massachusetts*, 505 U.S. 788, 820 (1992) (Stevens, J., concurring in part and concurring in the judgment) ("the statutory framework and *the long-held administrative tradition* provide a judicially administrable standard of review" (emphasis added)); *cf. INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that

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[11] *Heckler* itself arose in a far different context, namely an unusual judicial challenge to an agency's enforcement discretion under its own regulations. 470 U.S. at 827. This case, by contrast, involves an appeal of an agency's decision on an individual's attempt to vindicate his statutory right to file a motion to reopen a proceeding.

must be overturned as 'arbitrary, capricious, [or] an abuse of discretion[.]'" (internal quotation marks omitted)); *see supra* pp. 21 (citing cases reviewing BIA decisions involving equitable tolling and ineffective assistance of counsel).

It accordingly does not matter whether a noncitizen's claim for equitable tolling due to ineffective assistance of counsel is considered a statutorily authorized motion to reopen or a request for *sua sponte* reopening—in either scenario, the BIA applies a "meaningful standard" (Pet. App. 2) that can be reviewed by the court of appeals. That is a far cry from *Heckler*, where the decision whether to begin enforcement proceedings was "'committed' ... to the agency's judgment absolutely" and was a matter "within its expertise" requiring consideration of "many variables involved in the proper ordering of its priorities." 470 U.S. at 830, 831-832. By contrast, equitable tolling is a doctrine familiar to federal courts and not particular to the agency's expertise. There is accordingly no reason why courts cannot review BIA decisions denying equitable tolling due to ineffective assistance of counsel, regardless of what reopening authority the BIA invokes.

* * *

The Fifth Circuit was not free to develop its own judicially created exception to the jurisdiction Congress has given it by statute. The case should be remanded for that court to decide Mr. Mata's appeal on the merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

* * *

8 U.S.C. § 1229a. Removal proceedings

* * *

(c) Decision and burden of proof

* * *

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

* * *

8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

* * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * *

8 U.S.C. § 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review

any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court

of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

* * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * *

8 C.F.R. § 1003.2. Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * *

(c) *Motion to reopen.*

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former

hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

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